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In a recent issue (42 Cent. L. J. 154) we reported the opinion of the Supreme Court of Illinois in Campbell v. People, which decided that proof of all the elements of the *corpus delicti* may be made by presumptive or circumstantial evidence. That was a case where it was alleged that a newly born child had been murdered and the court was of opinion that such kind of evidence might be sufficient although it did not appear that any person had ever seen the supposed child. Though the case was perhaps decided correctly on the facts and is sustained by some authorities, we cannot agree with an eastern law exchange which says that "it tends to lay down principles of common sense." Precedents afforded by cases of that character are, in our opinion, very dangerous. A more recent Texas case, Condee v. State, 34 S. W. Rep. 286, on the same point, is more conservative.

In a recent case (Bridges v. Stevens, 34 S. W. Rep. 555), six of the seven members of the Supreme Court of Missouri divide by a vote of three to three on the question whether when a debtor, before the debt is barred, orally agrees, in consideration of the creditor's forbearance to sue, to waive the defense of the statute of limitations, such defense can or cannot be interposed. Missouri has a statute requiring a new promise of acknowledgment, in order to remove the statutory bar, to be in writing. Three of the Missouri judges hold that the statute of limitations was not a valid defense under the circumstances, and a fourth member of the court concurred in the result on the ground that the particular period of limitation relied on could not apply to the case at bar. The opinion of the judges holding that the defendant was not entitled to the benefit of the statute is in direct conflict with the decision of the New York Court of Appeals in Shapley v. Abbott, 42 N. Y. 443. Three members of the Missouri court approve of and rely on Shapley v. Abbott. The *New York Law Journal* contends with much earnestness that the view of the New York Court of Appeals is the sounder one, and that the members of the Missouri court who dissent from Shapley v. Abbott, point out a technical distinction, in saying that an agreement to waive the defense of the statute is not in express terms an acknowledgment of the indebtedness or a promise to pay the same. "This, of course," remarks the *New York Law Journal*, "is true, but we think the substantial position taken by the New York court is correct, that, except in so far as the agreement to waive the statute operates as an acknowledgment or a promise to pay, it is nugatory. In Shapley v. Abbott it is held that a verbal agreement to waive the defense of the statute would be sufficient as an acknowledgment of the debt, were it not for the provision requiring such acknowledgment to be in writing. Judge Earl, in Shapley v. Abbott, says, 'That if he (plaintiff) relied upon what the defendant then said as an agreement not to plead the statute, he would fail, if for no other reason, because there was no consideration for the agreement.' What seems more really to be lacking is a valid obligation moving from the debtor. As three of the Missouri judges point out, an agreement for forbearance by a creditor is usually an adequate valuable consideration. But in the new transaction the alleged consideration moving from the debtor is one that the policy of the law cannot recognize or countenance. Such policy is a broad one that something in writing shall be necessary to forestall or remove the bar of the statute of limitations. As remarked by Judge Earl in Shapley v. Abbott: 'A party may, undoubtedly, without trenching upon public policy, waive the defense of usury or of the statute of frauds or of the statute of limitations by omitting to set up the defense when sued. And he may waive his statute exemption by turning out exempt property when the officer comes with the execution; but no case has occurred to me in which a party can, in advance, make a valid promise that a statute founded in public policy shall be inoperative.'"

NOTES OF RECENT DECISIONS.

LIBEL — BOOK REVIEW — CRITICISM.—In Dowling v. Livingston, 66 N. W. Rep. 225, the Supreme Court of Michigan had before it an interesting question of libel in the writing of a book review, the holdings of the court being that where there is no misstatement of facts or of the propositions set forth in a book under review by a newspaper critic, it is not libelous for him to attack with sarcasm and ridicule the theories of the author; that in an action for an alleged libelous review of plaintiff's book, it is error to charge that defendant had the right to ridicule the book if, in the candid judgment of any fair man, the book deserved ridicule, since the critic himself is the judge of the language of his criticism. Where an author has quoted from another paragraph inclosed in quotation marks, but not credited by name, a statement by a reviewer that the author has quoted another without giving him credit does not charge him with plagiarism. For a critic to write, "of course, like all quack remedies, it would intensify the trouble," does not characterize the author under review as a quack. In a book review it is not libelous to write one of the author's views that Horace Greeley advocated the same doctrine, though it should appear that such was not the case. Where an author, in discussing Mr. George's proposition to take the land from the present owners without compensation, denounces it as "a gigantic piece of robbery," it is not libelous for a critic to write that the author "denounces the single tax scheme as robbery."

CONSTITUTIONAL LAW — LEGISLATIVE APPORTIONMENT—POWER OF COURT.—The Supreme Court of Indiana in Denny v. State, 42 N. E. Rep. 929, has recently gone fully over the question of the validity of the legislative apportionment act of that State, and has laid down a number of valuable rules in relation to the general principles involved. It holds (1) That the question as to the validity of such a law is not a political one, subject only to the discretion of the legislature; but that the courts of law have jurisdiction to determine its constitutionality; (2) That article 4 of the constitution of that State, which in section 4 requires a sexennial enumeration of the male inhabitants of the State over the age of twenty-one, and in section 5 provides that at the next session after each period of enumeration, the number of senators and representatives shall be apportioned among the several counties, prohibits the legislature, after it has made a valid apportionment of the State after such an enumeration, to reapportion the State during the six years period; and that the legislature is, also, precluded from repealing a valid apportionment law during the enumeration period in which it was passed; (3) That if the first apportionment law is unconstitutional, the legislature may at any time during the same enumeration period pass a second apportionment law, even before the first one has been declared unconstitutional by a judicial tribunal; (4) That under constitutional provisions that the number of senators and representatives shall be apportioned among the several counties according to the male inhabitants over the age of twenty-one in each (Const. Ind. Art. 4, § 5), and that a senatorial or representative district, when more than one county shall constitute a district, shall be composed of contiguous counties, and that no county, for senatorial apportionment, shall ever be divided (section 6), an apportionment act which groups together two or more counties, none of which has a voting population equal to the ratio for a senator or a representative, and gives to the district so formed more than one senator or representative, is unconstitutional, as an abuse of the legislative discretion of approximation, and derogatory to the right of local representation; especially when voters of other counties having the necessary ratio of voters are entitled under the act to vote for but one senator or representative; (5) That, unless it is absolutely necessary, a county which has slightly over the ratio for a representative should not be given one representative and also a voice in the election of another representative, in connection with other counties, while counties with a greater population are given only one representative; (6) That a judgment of the lower court, an appeal from which is dismissed, in an action between two citizens to test the constitutionality of an apportionment law, is not *res judicata*, as to the constitutionality of the act, in a subsequent action by the State; nor

will the doctrine of *stare decisis* require that that judgment be followed; and (7) That the fact that an election of members of the legislature has been had under an unconstitutional apportionment act does not estop the State from contesting its constitutionality before the election of the next legislature.

ASSIGNMENT—ORDER ON FUND IN BANK.—In Central Nat. Bank v. Spratlen, 43 Pac. Rep. 1048, it is decided by the Court of Appeals of Colorado that an order to a bank to pay, to persons named, a specified sum, out of a special fund, belonging to the drawer, in the hands of such bank, constitutes an assignment of such fund, to the persons named in the order, to the amount specified, whether the bank accepts the order or not. The following is from the opinion:

Appellant was a bank, engaged in business. Lane, being indebted to it, assigned his entire claim against the city to it—First, to secure the indebtedness; second, as his agent, to collect for him the entire claim, pay itself, and hold the balance to be disposed of as directed by him. The assignment was only for the amount of the indebtedness; the balance, for collection. The amount of the claim against the city is said to have been $2,300; appellant's claim against Lane, $1,198.57; balance belonging to Lane, $1,101.43; the Doyle attachment, $496.93; balance after Doyle attachment, $604.50. This was the condition of affairs on July 19th, when the order of Lane in favor of appellees for $500 was presented. The attachments of Beatty and McClelland were later in the day, and after the transfer of the $500 by Lane to appellees. The sworn answer of appellant, as garnishee in the different proceedings, set up this condition, and admitted the transfer of $500 to appellees from Lane, which it was to pay over. There was a full recognition of the transfer, its validity, and the legal liability of the bank to pay the amount, which it could not subsequently change and invalidate. It is clear that, so far as the excess over the indebtedness was concerned, appellant was only the agent or trustee, to apply the money as ordered by Lane. The trust was accepted, and it was its duty to apply the money as ordered by Lane. It was not invested with any discretion or power of adjudicating between the different claimants, and if in doubt it could only await the decree of a competent court. The question of the legality of the transfer of $500 from Lane to appellees was entirely between them, and, if challenged, it could only be by rival claimants for the same fund. The residue, after payment of the indebtedness to the bank, was a specific trust fund. Of that fund $500 was assigned to appellees. That such a transfer was a legal and equitable assignment of so much of the fund, whether the fund was in hand or to be received, is well settled by authority. It was an assignment, of the date of the order, and, if the money was not in hand, became operative when the money was received. In Christmas v. Russell, 14 Wall. 84, it is said: "A bill of exchange or a check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee. But an order to pay out of a special fund has always been held to be a valid assignment in equity, and to fulfill all the requirements of the law," and that such an assignment is good at law. See, Pom. Rem. & Rem. Rights, §§ 77, 85; Drake, Attachm. §§ 527, 528; 2 Wade, Attachm. § 537; McDaniel v. Maxwell (Or.), 27 Pac. Rep. 952, where the almost identical question involved in this case received careful attention. See, also, Trist v. Child, 21 Wall. 441; Christmas v. Russell, *supra*; Lapping v. Duffy, 47 Ind. 51; Brill v. Tuttle, 81 N. Y. 454; Peugh v. Porter, 112 U. S. 737, 5 Sup. Ct. Rep. 361; Wright v. Ellison, 1 Wall. 16; Fordyce v. Nelson, 91 Ind. 447; Legro v. Staples, 16 Me. 252. Consequently, if appellant attempted to exercise any discretion, or adjudicate the rights of rival claimants, and made a mistake, it must suffer the consequences. Its answer in this suit was at variance with its answer in the attachments, and it was bound by its answer in those. Neither of the matters set up in the answer was available to it as a disinterested custodian or agent, and could only be made available by some rival claimant to the same fund.

HOMESTEAD—WHAT CONSTITUTES—DECLARATION.—In Power v. Burd, 43 Pac. Rep. 1094, the Supreme Court of Montana decides that, under Code Civ. Proc. § 322, providing that a homestead consisting of a certain quantity of land owned and occupied by any resident of the territory shall be exempt from forced sale, the mere declaration of an intention to claim land as a homestead, without improvement or occupancy thereof, is insufficient to constitute the land a homestead. The court says in part:

Our statute is exactly the same as that of Minnesota. The courts of that State hold that actual occupancy is necessary to constitute a homestead in land. Quehl v. Peterson, 47 Minn. 13, 49 N. W. Rep. 390; Tillotson v. Millard, 6 Minn. 513 (Gil. 419); Sumner v. Sawtelle, 8 Minn. 309 (Gil. 272); Kelly v. Baker, 10 Minn. 124 (Gil. 154); Kresin v. Mau, 15 Minn. 87 (Gil. 116); Kelly v. Dill, 23 Minn. 435. Under a similar tatute to ours the Supreme Court of California, ins many decisions, holds that actual occupancy is necessary to acquire a homestead in land. Gregg v. Bostwick, 32 Cal. 220; Villa v. Pico, 41 Cal. 469; Babcock v. Gibbs, 52 Cal. 629; Lubbock v. McMann, 82 Cal. 228, 22 Pac. Rep. 1145; Tromans v. Mahlman (Cal.), 27 Pac. Rep. 1094. See, also, Tillar v. Bass (Ark.), 21 S. W. Rep. 34; Hotchkiss v. Brooks, 93 Ill. 386; Thomp. Homest. & Ex., §§ 100-105; Wap. Homest. & Ex., pp. 176-186. In Bonner v. Minnier, 13 Mont. 269, 34 Pac. Rep. 30, the authorities are collated on this subject. While in this case there was a dissenting opinion, there was no difference of opinion that under our statute occupancy was necessary to acquiring a homestead in land. The authorities are too numerous to cite which hold that an intention to claim and occupy land as a homestead is not sufficient to constitute a homestead. Counsel for appellant rely upon Reske v. Reske, 51 Mich. 541, 16 N. W. Rep. 895, in which case actual occupancy was not required. But in Reske v. Reske the claimants had fenced the lot which was procured for a home. They were proceeding to improve and occupy it to the extent of their means; they had their domestic animals on it; they came to

live in the immediate vicinity of the lot; they dug a well; they put up outbuildings. Everything but building the dwelling was done before the levy. Here something more had been done and was being done by the claimants than merely declaring their intention to claim and occupy the land in question as a homestead. So in the other cases cited by appellant. In the case at bar appellant had done, at the time of levy, nothing, except to declare his intention to claim and occupy the land in controversy as a homestead, nor does it appear that he has done anything since towards improving or occupy the land as a homestead. We think it may be said that, according to the great weight of authority under statutes like ours the mere declaration of an intention to claim land as a homestead is insufficient to constitute the land a homestead.

EVIDENCE ILLEGALLY OBTAINED.

"Cases do not make law, but law cases." While the above is true of adjudicated cases not founded on principle, yet such decisions make the law of that particular case. I hope, therefore, in this article, to show the errors of several State courts in the admission of evidence illegally obtained in a criminal cause. It is a fact, the subject of most profound regret, that upon a matter of such vital importance the courts seem to have lost sight of the constitution, the principles of the common law, and the great object and purpose to be derived therefrom. The writers of the opinions hereinafter noted seem to have had but one purpose in view, and that was to sustain the admissibility of the evidence because, to their minds, it pointed directly to the guilt of the accused, and to support them harp upon the one string: "That the object of the law is to get at the truth." While it is true that the object of the law is to get at the truth, yet the law is more concerned in the means adopted to procure the evidence of that truth than in the admission of evidence improperly obtained, although the evidence, so obtained, is clear and convincing. Experience has taught, and the law recognizes, that courts should consider in the admission of evidence, that no pernicious precedent be established by which a wrong may be done in the future. Courts are not established for the detection of crime, but for the correction of crime. Among the first cases to which I refer is the case of Graham.[1] In that case the officer who had the prisoner in custody compelled him to place his foot in the tracks found in the prosecutor's field, and the officer was allowed to testify, over objection, that the foot of the prisoner fitted the tracks exactly. Counsel for the prisoner insisted that the evidence was procured by duress; the court said: "The object of all evidence is to elicit the truth," * * * "no hopes or fears of the prisoner could produce the resemblance of his tracks," also that "the evidence was real evidence." The footprint was real, but that it was the footprint of the prisoner was a point to be established and was not real evidence. The fact was that the officer compelled the prisoner to make evidence against himself by placing his foot in the footprint found, yet the court said that this compulsion was not duress. Duress is defined:[2] 1st. "Constraint, confinement, imprisonment. 2d. The state of compulsion or necessity in which a person is induced by the restraint of his liberty or menace of bodily harm to execute a deed or do any illegal act." In a broader sense it means, all evidence not freely and voluntarily given by the accused, but extorted by torture, force, coercion or duress of imprisonment. In the case now under discussion the defendant was compelled to furnish evidence against himself in violation of the constitution and the maxim of the common law: "*Nemo tenetur seipsum prodere.*" The court in its opinion cites Mr. Best to support its theory that the evidence was real evidence. Mr. Best was but giving illustrations of what was real evidence; but no place in his book does Mr. Best say that such evidence is competent evidence, but on the contrary says:[3] "In the next place the proposition that it is the duty of the courts of justice to use all available means to get at the truth of the matters in question before them must be understood with these limitations: 1st. "That those means be such as are likely to extract the truth in the majority of cases; and secondly, that they be not such as would give birth to collateral evils, outweighing the benefit of any truth they might extract." Had the court reflected but for a moment it would have considered that it was not the footprint but the similarity that the prosecution was after. With the constitution as a shield to protect the defendant in a criminal case, from being compelled to produce evi-

[1] State v. Graham, 74 N. C. 646.

[2] Burrill.

[3] Best Principals, Ev. Sec. 558.

dence against himself by word, act or deed, secured by the reason of compulsion, if any force may be used to compel him so to do, we are back to the thumb-screw period. The law does not recognize force divided into parts; so if any force or compulsion is used in obtaining evidence, either confession or fact, it is inadmissible. There are some cases that hold that a confession obtained, not freely and voluntarily made, and so excluded, a fact obtained by reason of confession will be admitted with sufficient of the confession to make it clear as to its connection with the crime. Such cases are those "that palter with us in a double sense." A fact is always the pivotal point in a criminal case. Although the case of Graham seems to be the stepping-stone for the courts of Texas, Nevada, and Indiana, which by sly approaches have, in their State, overturned the maxim, "*Nemo tenetur seipsum accusare*," and the constitution, the courts of Illinois and Alabama, do so by virtue of an example set by the court of Massachusetts. When Mr. Redfield in his edition of Greenleaf falls into the same error as the court of Massachusetts there is some excuse, probably, for the thoughtless decisions of the above courts. Greenleaf says: "The courts will not take notice of how the evidence is obtained out of court."[4] While I do not consider for one moment that the decision of any court can overturn the constitution it is well to examine into and "behold how great a matter a little fire kindleth." In the case of Com. v. Danna,[5] the question was, whether a search or seizure of the defendant's papers or property, directed by a warrant in the case, was an unreasonable search or seizure. The defendants' counsel insist, that such searches and seizures are entirely inconsistent with the plainest principles of common law and natural rights of mankind. That the right to search for and seize private papers is unknown to the common law is most conclusively shown by the able opinion of Lord Camden.[6] The Massachusests court, after discussing Entick v. Carrington, while apparently agreeing with Lord Camden, the court said: "When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully, nor would they frame a collateral issue to determine that question."[7] The decision of the court of Massachusetts is distinguished in several ways: 1st. It is the first time a court ever so stated the law in a criminal case. 2d. It has been followed by a text-writer and several State courts. 3d. It renders the provisions of the constitution inoperative. The case of Leggat v. Tollervey, which the court of Massachusetts cited, was an action on the case for malicious prosecution; and the plaintiff called an officer of the court who produced the indictment, but it did not appear that either the court or attorney-general had authorized a copy to be given to the plaintiff, according to the rule of the Old Bailey, and the court nonsuited the plaintiff. A motion was made for the setting aside the nonsuit, on the grounds that the want of an order from the court for a copy of the indictment was not necessary to found the plaintiff's right of action, whatever difficulty he might be under in obtaining the necessary proof. Best, Serjt., opposed the rule, and insisted that the officer who produced the records from the session had no authority from the court nor fiat from the attorney-general, therefore the evidence was properly rejected. They referred to the general orders made by the judges of the Old Bailey in 16 Car. 2: That no copies of an indictment for felony be given without special order, upon motion made in open court, at general goal delivery, for the late frequency of actions against prosecutors. Shepherd, Serjt., in support of the rule, insisted upon the admissibility of the records when ready to be produced; though the officer, without an order for the purpose, might not have been compelled to produce on *subpœna duces tecum*. The order can never be necessary to make the record or an examined copy evidence which is evidence *per se* and only evidence of the allegation of prior indictment. Lord Ellenborough, C. J.: "It is very clear that it is the duty of the officer, charged with the custody of the records of the court, not to produce a record but upon competent authority, which at the Old Bailey is obtained upon application to the court, pursuant to the order which has long prevailed there; and with respect to the records of the realm upon application to the

[4] Sec. 254*a*, Gr. Ev; Com. v. Danna, 2 Met. 329; Leggat v. Tollerrey, 14 East, 302.

[5] 2 Met. 329.

[6] Entick v. Carrington, 19 Howells St. Trials, 1029.

[7] Leggat v. Tollerrey, 14 East, 302.

attorney-general. But if an officer shall, even without authority, have given a copy of the record, or produce the original, and that is properly proved in the evidence, I cannot say that such evidence shall not be received. He may incur the penalty of his contempt of the court, and he may be warned at the time of his peril in so doing; and a discreet officer placed in such a position would, doubtless, before he produced a record, or gave a copy of it, apply to the court, and state the circumstances of the case; and it cannot be doubted that he would be saved harmless in doing what, after such a disclosure, the court should order him to do. But still I cannot help thinking that the rule laid down by Lord C. J. Lee, in the case of Jordan v. Lewis, is a correct one. The order made at the Old Bailey was then read by way of objection to the evidence offered, but the chief justice said that he could not refuse to let the plaintiff read the copy of the indictment, though obtained without an order of the court for the purpose. If the production of such an order were essential to the validity of the evidence of the record of acquittal on the former prosecution, or a true copy of it were found a fact in special verdict, it would be immaterial, unless the order of the judge or court before whom it was tried, allowing it, were also proved and found. But can this be stated? Even if it were found negatively that the judge or court had refused to allow the party acquitted a copy of the indictment, yet if, in the subsequent action for a malicious prosecution, the plaintiff gave in evidence that which he was able to prove to be in fact a true copy of the indictment, can it be said it would not be available? With deference, then, to the opinion expressed by Mr. Baron Adams in the case cited, by which alone the opinion of the learned judge appears to have been governed on the trial of this cause, I do not see how the circumstance of the copy of the record having been, as he says, surreptitiously taken, can affect the validity of the proof, though the officer's conduct in lending himself as a voluntary instrument to the plaintiff's purpose might with propriety be animadverted upon by the court. The order of the Old Bailey does not state that actions against prosecutors cannot be maintained without an order first obtained for a copy of the indictment, but only that they cannot be maintained without copies. The other judges assenting, the order made setting aside the nonsuit may be made absolute. And this case is the foundation for the decision in Com. v. Danna, upon which is built Sec. 254*a*, Greenleaf Ev. If a witness for the prosecution is placed upon the stand to detail a confession, or to produce a paper, weapon or money, or other fruits of crime, the relevancy must first be shown; and if in connecting the confession or other evidence with the alleged crime, any act which would show compulsion or unlawful seizure in procuring the evidence goes to its competency, I fail to see what issue would have to be framed to try the issue alluded to by the Massachusetts court which the plea of not guilty does not.

If it were a civil case it is hardly necessary to say that the law would be different. But it is as Justice Bradley observed,[8] that, "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal procedure." Upon the supposed faith of section 254*a*, Gr. Ev., was decided, Seibert v. People,[9] in which the court said: "The papers may have been illegally taken from the defendant on a criminal charge, the papers being pertinent to issue; the court will not take notice of how they were obtained." This case was followed by the Alabama court.[10] The jailer searched the person of the prisoner and discovered a pistol subsequently offered and received in evidence over objection that the search was illegal. Held, objections properly overruled. Reasons given by the court are: 1. "That the search was unauthorized and illegal we cannot doubt. The sheriff is the jailer, having the legal custody and charge of the county jail and of the prisoners therein confined, he may commit the custody and charge to a jailer for whose acts he is civilly liable. Cr. Code Sec. 4535. While it is true that the search of the defendant was without legal justification, a trespass, and an indictable misdemeanor, we know of no theory or principle upon which the State may be deprived of the right to employ the evidence of a criminal offense thus obtained. As is observed by the Supreme Court of Illinois (citing 138 Ill. 111): "The

[8] Boyd v. U. S., 116 U. S. 616.
[9] 138 Ill. 111.
[10] Shields v. State, 39 Cent. L. J. 396.
[11] Duffy v. People, 26 N. Y. 590, and cases cited.

State had no connection with, and no agency in, the wrong committed by the sheriff: "The law appoints the remedy for the redress of the wrong, but the exclusion of the evidence criminating the defendant is not within the scope of the remedy." 2. "That the court cannot take notice of how the evidence is obtained." What a saving grace there is in the fact that the law provides a remedy for civil action—with what satisfaction and comfort could a convicted person, in a capital case, upon such evidence, contemplate a civil action for damages. Another verity of case-law is "The rule which excludes evidence of the confessions of persons charged with crime, where such confessions have been made under the influence of threats or promises, has never been held to exclude evidence of any facts which were ascertained in consequence of such confessions."[11] But the court of that State has decided the law in the case of People v. McCoy[12] as follows: A woman indicted for the murder of an illegitimate child at birth, the coroner had directed two physicians to go the jail and examine her private parts to determine whether she had been recently delivered of a child. She objected to the examination but being threatened with force, yielded, and examination was had. Their evidence was offered at the trial and ruled out. The court said the proceeding was in violation of the spirit and meaning of the constitution. "They might as well have sworn the prisoner and compelled her by threats to testify that she had been pregnant and had been delivered of a child, as to have compelled her, by threats, to allow them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and had been recently delivered of a child." In Boyd v. U. S., *supra*, an information was filed by the district attorney for the southern district of New York against 35 cases of plate glass. The charge was that the goods were imported into the United States without payment of duty. On the trial the district attorney offered in evidence, for the purpose of showing value, an order of the district judge, requiring the defendant to produce the invoice. The claimant in obedience to the notice but objecting to its validity and the constitutionality of the law, produced the invoice. The court held: "The clauses of the constitution, to which it is contended the laws are repugnant, are the fourth and fifth." It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the constitution in all cases in which a search and seizure would be; because it is a material ingredient, and affects the sole object and purpose of search and seizure." The Supreme Court of the United States, in the case last cited, quote at length from Lord Camden in Entick v. Carrington as follows: "The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than Lord Coke denied its legality (4 Inst. 176); and, therefore, if the two cases resembled each other more than they do we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge, upon oath, of theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description." "If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy; my answer is, that all these precautions would have been long since established by law if the power itself had been legal, and that the want of them is an undeniable argument against the legality of the thing." Then, after showing that these general warrants for search and seizure of the papers originated

[12] 45 How. Pr. 216.

with the Star Chamber, and never had any advocates in Westminster Hall except Justice Scroggs, Lord Camden proceeds: "Lastly it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence." "I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. In a criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our laws provide no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty." The Supreme Court of the United States concludes: "Can we doubt that when the fourth and fifth amendments were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and the 'unreasonable' seizures. It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they had been engaged for more than twenty years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred." "We have already noticed the intimate relation between the two amendments. They throw great light upon each other. For the 'unreasonable searches and seizures' condemned in the fifth, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth, amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is clearly within the intent and meaning of those terms." In the case of Ah Chuey,[13] the court held that it was not error for the court to compel the defendant to unbare his arm to the jury. This case stands alone except for the favorable comment made upon it by the Indiana court.[14] But as the case of Ah Chuey has been heretofore commented upon in the CENTRAL LAW JOURNAL, it is necessary only to add two additional cases to those cited in the article referred to. Lord Mansfield observed,[15] "that in civil causes the court will force the parties to produce evidence which may prove against themselves, or leave the refusal to do it (after proper notice) as a strong presumption to the jury. The court will do it in many cases, under particular circumstances, by rule before trial; especially if the party from whom the production is wanted applies for a favor. But in a criminal or penal cause the defendant is never forced to produce any evidence, though he should hold it in his hands in court." Justice Grey, of United States Supreme Court,[16] said: "No right is held more sacred than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "the right to one's person may be said to be a right of complete immunity; to be let alone." Cooley Torts, 29. "The inviolability of the person is as much invaded by a compulsory stripping as a blow." The courts of North Carolina, Texas, Indiana and Nevada, with one case in New York, based their opinions upon what they termed fact or real evidence, while Illinois and Alabama followed the false premise of the Massachusetts court. However laboriously the courts may file away, with judicial subtleties at the ancient mere-stones, they will stand forever as a protection to personal rights and personal security.

Tacoma, Wash. J. F. RAMAGE.

[13] State v. Ah Chuey, 14 Nev. 79.
[14] O'Brien v. State, 125 Ind. 38.
[15] Roe v. Harvey, 4 Burrows, 2489.
[16] U. P. R. R. Co. v. Botsford, 141 U. S. 250.

VENUE IN CIVIL CASES—JURISDICTION BY SERVICE OF SUMMONS—PRIVILEGE OF LITIGANT.

POWERS V. ARKADELPHIA LUMBER CO.

Supreme Court of Arkansas, January 18, 1896.

Under Sand. & H. Dig. § 5696, permitting certain actions to be "brought in any county in which the defendant, or one of several defendants, resides or is summoned," jurisdiction cannot be obtained of a defendant, in a county other than that of his residence, by service of summons on him while in such county in attendance on the taking of depositions in a pending action to which he is a party.

BUNN, C. J.: A suit in chancery was pending in the Clark circuit court, wherein the appellant, Powers, was plaintiff, and the Arkadelphia College was defendant, for a balance of $700 or $800 claimed by Powers to be still due him on his contract for erecting the college buildings. By agreement of counsel representing the respective parties, they met at Arkadelphia, and took depositions in the case on the 17th day of August, 1893. On the same day the complaint in this cause was filed by counsel for plaintiff herein, who were also counsel for defendant in the chancery cause in which the depositions were being taken, as stated; and summons at once issued, and was served upon appellant, to be and appear in the Clark circuit court to defend herein. At the following term of said circuit court defendant, Powers, appeared for the sole purpose of moving the court to quash the summons served upon him, as aforesaid, showing by affidavit that he was, at the time of the service of said summons, and continued to be, a resident of the city of Little Rock, in Pulaski county, as he had been for a long time previously, and that he was present in Arkadelphia on the 17th day of August, 1893, for the sole purpose of attending the taking of the depositions aforesaid, and that the same was necessary, and that advantage of attendance was taken to compel him to defend his said suit in another jurisdiction than that of his residence. He therefore prayed that the summons be quashed. His motion to that effect, however, was overruled, he saved exceptions, judgment was rendered against him, and he appealed.

There is really no controversy as to the facts—at least none that could affect the issue. We think the judgment ought to be reversed. After several sections immediately preceding, designating where civil actions are to be brought, according to the nature of the subject-matter and the relative situation of the parties, Section 5696, Sand. & H. Dig., reads thus: "Every other action may be brought in any county in which the defendant, or one of several defendants, resides or is summoned." Similar statutes are found in all, or nearly all, the States. The appellee contends that the privilege of defendant should be restricted to the rule held by some of the courts, as in Illinois, for example—that is, to cases of arrest on civil process—and that the exemption does not extend to a non-resident suitor in ordinary cases, temporarily present in the State and county, or in the county, for the mere purpose of attending a suit to which he is a party, unless his presence has been procured by some artifice, trick or fraud of plaintiff or of his counsel; citing Greer v. Young, 120 Ill. 184, 11 N. E. Rep. 167. We think, however, that the weight of authority is against that view of the subject. See Works, Jur. pp. 258-260. One line of authorities rests the privilege solely on the familiar constitutional ground of freedom from arrest on civil process, but we prefer to rest it also on the ground of a sound public policy, so aptly expressed by the Supreme Court of Ohio in the case of Andrews v. Lembeck, 46 Ohio St. 41, 18 N. E. Rep. 483, thus: "The question is one which profoundly concerns the free and unhampered administration of justice in the courts. That suitors should feel free and safe at all times to attend, within any jurisdiction outside of their own, upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer to some other adverse judicial proceeding against them, is so far a rule of public policy that it has received almost universal recognition wherever the common law is known and administered," citing many authorities. And, continuing, say that court: "The contention that the application of this principle should be or is confined to cases where the suitor is served with process while attending upon judicial proceedings without his State is not supported by sufficient force of reason to justify the distinction." The statute of that State is similar to ours. In Lamkin v. Starkey, 7 Hun, 479, the Supreme Court of New York said: "The court has power, independently of the statute, to protect its suitors, officers, and witnesses." And the same is substantially said by the same court in Matthews v. Tufts, 87 N. Y. 568. And it further appears, from the great weight of authorities, that the privilege is not only assured while one is attending upon strictly judicial proceedings but upon any tribunal whose business has reference to or is intended to affect judicial proceedings. In Larned v. Griffin, 12 Fed. Rep. 590, the court said: "It has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during attendance, and for a reasonable time in going and coming," and further, "that this protection extends to attendance of parties and witnesses before arbitrators, commissioners, and examiners." That was a case of arrest, it is true, but it is cited to show the nature of the tribunal an attendance upon which will come under the rule. In the case of Mulhearn v. Publishing Co., 21 Atl. Rep. 186, the Supreme Court of New Jersey said that the vice-president of a foreign corporation, attending as a witness before a commissioner of that court, which testimony is to be used in a

cause therein pending, is privileged from service of summons to appear in another action against said corporation. The weight of authority is decidedly with the appellant, and the judgment is reversed, and the case is dismissed, without prejudice.

NOTE.—*Immunity from Process.*—The privilege of exemption from service of process which a suitor or witness has while necessarily without the jurisdiction of his residence, either for the purpose of attending any trial of a cause wherein he is a party, or in which he is a witness, is a very ancient one. Vin. Abr. "Privilege." It is uniformly sustained by the modern authorities: Massey v. Colville, 45 N. J. L. 119; May v. Shumway, 16 Gray (Mass.), 86; Henegar v. Spangler, 29 Ga. 217; *In re* Healey, 53 Vt. 694; Mitchel v. Huron, Ct. Judge, 53 Mich. 541, 19 N. W. Rep. 176; *In re* Cannon, 47 Mich. 481, 11 N. W. Rep. 280; Bridges v. Sheldon, 7 Fed. Rep. 36, 42-45; Larned v. Griffin, 12 Fed. Rep. 590; Person v. Grier, 66 N. Y. 124; Kinne v. Lant, 68 Fed. Rep. 436; Brooks v. Farwell, 4 Fed. Rep. 166; 1 Greenl. Ev., sec. 316; Fisk v. Westover, 4 S. D. 233, 55 N. W. Rep. 961; People v. Judge, 40 Mich. 729; Palmer v. Rowan, 21 Neb. 452, 32 N. W. Rep. 210. And the better reason and the decided trend of the authorities is to the effect that the rule governing the immunity is the same where the parties are nonresidents of the State where the process is served, and where they simply live in a county of the same State other than where served. Person v. Grier, 66 N. Y. 124; People v. Inman, 74 Hun, 130; Miles v. McCullough, 1 Bin. (Pa.) 77; Mitchell v. Huron, 53 Mich. 541, 19 N. W. Rep. 176; Shaver v. Letherby, 73 Mich. 500, 41 N. W. Rep. 677; Sherman v. Grendloch, 37 Minn. 118; Kinne v. Lant, 68 Fed. Rep. 436; Brooks v. Farwell, 4 Fed. Rep. 166; Atchinson v. Morris, 11 Fed. Rep. 582; Fisk v. Westover, 4 S. D. 233, 55 N. W. Rep. 961; Small v. Montgomery, 23 Fed. Rep. 706; First Natl. Bank v. Ames, 39 Minn. 179, 39 N. W. Rep. 308; Walpole v. Alexander, 3 Doug. (Mich.) 45; Mallory v. Brewer (S. D.), 64 N. W. Rep. 1120; Wilson v. Donaldson, 117 Ind. 356, 20 N. E. Rep. 250; Bolgiano v. Gilbert Lock Co., 73 Md. 132, 20 Atl. Rep. 788; Kaufman v. Kennedy, 25 Fed. Rep. 785; Parker v. Marco, 136 N. Y. 585, 32 N. E. Rep. 989. Nor is it simply a present privilege of the party or witness, but it is that of the court itself, as well, and one deemed necessary from the experience of the ages for the upholding of the dignity and authority of the court, and to promote the due and unhampered administration of justice. Person v. Grier, 66 N. Y. 124. And at common law a writ of protection would issue to the party or witness by the court in which the action was pending, which would be respected by the other tribunals. And this power doubtless exists to this day in courts of common law jurisdiction, though the occasion for the exercise of it does not often present itself. But the granting of the writ of privilege, which, while proper, is not at all necessary to the security of the person from process, it only furnishes a convenient and authoritative notice to those who disregard it. Bridges v. Sheldon, 7 Fed. Rep. 44; Parker v. Marco, 136 N. Y. 585, 32 N. E. Rep. 989.

The immunity extends to every case where the attandance is a duty or is necessary in conducting any proceeding of a judicial nature. Bac. Abr. "Privilege" B. 2; People v. Judge, 40 Mich. 729; Palmer v. Rowan, 21 Neb. 452, 32 N. W. Rep. 210. It applies to plaintiffs and defendants in a cause without distinction (Fisk v. Westover, 4 S. D. 233, 55 N. W. Rep. 961), nor is there any difference in the application of the rule between parties and witnesses. Palmer v. Rowan, 21 Neb. 452, 32 N. W. Rep. 210. And it is not necessary that the party be served with process. He may waive this and attend out of his jurisdiction, either as a suitor or witness, if he do so in good faith, and the immunity will still attend him. Ballinger v. Elliott, 72 N. C. 596; Arding v. Flower, 8 Tr. 534; Palmer v. Rowan, 21 Neb. 452, 32 N. W. Rep. 210; 1 Greenl. Ev. sec. 316; Dungan v. Miller, 36 N. J. L. 182; May v. Shumway, 16 Gray (Mass.), 86. And the privilege extends to cases civil as well as criminal proceedings. Atchinson v. Morris, 11 Fed. Rep. 582; Cameron v. Roberts, 87 Wis. 291, 58 N. W. Rep. 376; Person v. Grier, 66 N. Y. 124; Miles v. McCullough, 1 Bin. (Pa.) 77. "The privilege of parties to judicial proceedings, as well as others required to attend upon them, of going to the place where they are held, and remaining so long as is necessary, and returning wholly free from the restraint of process in other civil proceedings, has always been well settled and favorably enforced. It is mentioned in the Year Book, 20 Henry VI, 10, and enforced to protect not only the body of the suitor from arrest, but his horse and other things necessary for his journey which would otherwise be attachable." Brodie v. Sheldon, 7 Fed. Rep. 34, 43. Nor have the courts ever been inclined to restrict this privilege; on the contrary, it has always been the rule to allow every reasonable indulgence to persons claiming it. 1 Sell. Pr. 123. The privilege extends to every case where attendance is a duty in conducting any proceeding of a judicial nature. 1 Greenl. Ev., sec. 317; Bridges v. Sheldon, 7 Fed. Rep. 34, 43.

In Bours v. Tuckerman, 7 Johns. 538, one Williams was under recognizance to appear at the General Sessions of the Peace, and, appearing in obedience thereto, and before his discharge, was arrested upon a *capias ad respondendum*. He claimed his privilege in due form, and the Supreme Court of New York ordered his discharge on filing bail. But such a condition of the granting of the privilege is practically withholding it, as the party would, after all, have to respond to the bail bond or suffer the consequences, which, it is reasonable to presume, ordinarily, are tantamount to answering the proceedings in response to a summons or an indictment. The manifest error of this ruling was so palpable as to impress the court, in a later case, the necessity of repudiating it entirely and holding as was held in Norris v. Beach, 2 Johns. 294, that the immunity was absolute and unconditional, and could not be hampered by requiring the party concerned to give bail. Sanford v. Chase, 3 Cow. (N. Y.) 381. The reason for, and nature of, the privilege is thus clearly stated in Person v. Grier, 66 N. Y. 124. "It is the policy of the law to protect suitors and witnesses from arrests upon civil process while coming to and attending the court and while returning home. Upon principle, as well as upon authority, their immunity from the service of process for the commencement of civil actions is absolute *eundo morando et redeundo*. . . . This immunity is one of the necessities of the administration of justice, and courts would often be embarrassed if suitors or witnesses, while attending court, could be molested with process. Witnesses might be deterred and parties prevented from attending, and delays might ensue or injustice be done." Some instances in which the privilege has been upheld will be mentioned. Where one attends an arbitration to be examined under a rule of court, the privilege attaches.

Spence v. Stuart, 3 East, 89; Sanford v. Chase, 3 Cow. (N. Y.) 381. Likewise in case of a party necessarily attending proceedings in bankruptcy. Mathews v. Tufts, 86 N. Y. 568; King, *ex parte*, 7 Ves. Jr. 312; Arding v. Flower, 8 Tr. 534. So is a witness who attends to give his deposition before an officer in an action pending in court exempt. U. S. v. Edme, 9 S. & R. (Pa.) 147; Parker v. Marco, 136 N. Y. 535, 32 N. E. Rep. 989. Where a suitor came from a foreign jurisdiction at the request of his counsel for the purpose of consultation during the progress of a demurrer in his case and argument thereon, he was held to be privileged from process during his attendance upon the court, as well as during temporary recess taken for the convenience of the court. Kinne v. Lant, 68 Fed. Rep. 436. And in a case where a party to an action pending in Massachusetts was attending the taking of evidence in his cause in the city of New York before a special examiner was served with a summons in an action in New York during a temporary adjournment, it was held that he was privileged. Judge Blatchford in disposing of the issue well said: "The defendant attended as a party before the examiner. The regularity of the examination was recognized. It was thus made a regular proceeding in the suit in Massachusetts. The defendant had a right to attend upon it in person, whether he was to be himself examined as a witness or not. He attended in good faith, the examinatfon was pending and unfinished, and he was served during the interval of an adjournment. The privilege violated was a privilege of the Massachusetts court, and one to be liberally construed for the administration of justice." Plimpton v. Winslow, 9 Fed. Rep. 365. For a like reason, one attending an examination, either as party or witness, before a master in chancery is privileged. Dungan v. Miller, 36 N. J. L. 182. In the case of Atchinson v. Morris, 11 Fed. Rep. 582, the defendant was a resident of Wisconsin, and was attending court in Chicago in obedience to process, when he was summoned in that city to appear in a civil action. He petitioned for a removal of the cause to the federal court which, being granted, he moved in that tribunal to quash the return of the summons. It was held that he was privileged from process in the State court, and that his petition and removal of the case to the federal court had not deprived him of his right to insist on his immunity. And this rule obtains though the motion to quash be filed in the State court before the removal is effected or even petitioned for. Kaufman v. Kennedy, 25 Fed. Rep. 785.

The time in which a suitor or witness may remain after his case is disposed of, or his testimony given, is such time as is reasonably necessary. And where a party to a suit, attending court out of the jurisdiction of his residence, was served the next day after the trial had ended, it was properly held that he was still privileged, as he might well be detained a day in rounding up his business in court, such as settling up costs, giving directions about execution and kindred matters. "Courts will not nicely scan the time of the return." Hayes v. Shields, 2 Yeates (Pa.), 222; Larned v. Griffin, 12 Fed. Rep. 590; Atchinson v. Morris, 11 Fed. Rep. 582; Cameron v. Roberts, 87 Wis. 291, 58 N. W. Rep. 376.

Generally, it is necessary, in order to protract the protection of privilege, that the suitor or witness attending a judicial proceeding of any kind return to his jurisdiction without unnecessary delay. If he should voluntarily and unnecessarily prolong his stay beyond the time reasonably necessary for his going and return, he would lose the protection the instant that he remained over a reasonable time, and would, of course, then become subject to process the same as though he had come into the distant jurisdiction voluntarily and with no business purpose in view. But where a suitor who had been in attendance upon an arbitration was arrested on criminal process early the next morning before a proper time to leave, Lord Ellenborough held that he was clearly privileged. Spence v. Stuart, 3 East. 89.

There are a very few cases, mostly early ones, which seem to lean to the idea that the privilege can extend only to immunity from arrest in a civil action. This is held to be the law in a comparatively late case in Illinois, where two citizens of Missouri were engaged in a suit in that State, and it became necessary to take depositions in Chicago on behalf of the defendant, who accompanied his attorneys at the taking of the testimony, and, while so attending, was served with process in Illinois upon the same action. Upon motion to quash the return of the summons, it was held that the defendant was not exempt from service (Greer v. Young, 120 Ill. 184, 11 S. E. Rep. 167); and some of the earlier decisions in this State appear to be in harmony with this contention. The case, however, receives the criticism of the court in the principal case, where a contrary view, announced in a late Ohio case, is reviewed at length and unqualifiedly approved. This is evidently the true doctrine as existing at this day, and is sustained by overwhelming authority.

The immunity is of no less service or less protection in a criminal case, or an arrest under civil proceedings, than is the privilege of attending unmolested upon every stage of a legal proceeding, wherein the most sacred personal and property rights may be at stake. There is no greater difficulty, necessarily, in meeting a civil than a criminal charge; at least the necessity of the suitor's presence is as great and as indispensable in the one class of cases as in the other. All one might have could be involved in a civil case, while a criminal prosecution might involve only a nominal fine. It might, therefore, be much more important for the party to be affected to be present at his civil suit than at a criminal trial. True, he should be privileged to be at either, and, as we have seen and contend, he is privileged alike in both cases, and in the one just as fully and comprehensively as in the other. The leverage obtained by a litigant over his adversary, by getting service in a local jurisdiction to one and foreign as to the other, is very great, and, doubtless, might be such as to impel one to forego the privilege of attending the testimony in a case of no vast importance to avoid the possibility of service if he should invade the foreign jurisdiction. But the law knows no difference in the magnitude of cases, but offers a fair and impartial trial, with all necessary privileges and immunities in a case involving small amounts, as well as in cases where the most gigantic property or other rights are involved. Justice knows no degrees, but holds the most trivial right as inviolably sacred as the most important, and guarantees the privilege without distinction in all cases, whether criminal, *quasi* criminal or civil.

W. C. RODGERS,

Nashville, Ark.

JETSAM AND FLOTSAM.

THE TORRENS' SYSTEM OF LAND TRANSFERS IN OHIO.

The Torrens' system of land transfers is now a law in Ohio. The law as originally drawn, and as it passed the senate, made the registration of land by owners, while living, permissive merely, but provided that whenever any person died seized of a fee-simple title to unregistered land, the executor of the estate of such deceased owner, should make application to have the same registered. By compelling representatives of decedents to have their lands registered, it was expected, that within a generation or so the whole of the land in the State would become registered. The lower house, however, did not take well to this mandatory provision, and by changing the word "shall" to "may," made it simply permissive. It was a small change, but one of very great effect. Instead of registration going forward in every county, it will be but here and there an isolated case. The law provides that upon first bringing land under the act, the owner must pay into an assurance fund, one-tenth of the value of the land as appraised for taxation. This will stand in the way of voluntary registration. The present law will, however, be an educator, and undoubtedly efforts will be made at the next general assembly to restore the mandatory provisions. In the meantime the people will have a chance to acquaint themselves with the practical value of the system.—*Ohio Legal News.*

BOOK REVIEWS.

AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, VOL. 29.

This volume is the last one of the series and comprehends subjects from "water companies" to "youth." It includes a very exhaustive article on the first mentioned topic, a paper on wills of nearly four hundred pages in length, one on witnesses nearly as long and a useful article on working contracts. This series of books is now well known to the profession and is of great value to the active practitioner. It possesses an especial value to those who have not access to libraries and text books inasmuch as, in a compact form, the substance of the law together with the adjudications of court may be readily found. It is published by Edward Thompson Co., Northport, Long Island, N. Y.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Sale of Decedent's Land.—The purchase of the land of an estate by one of several heirs, at a sale under order of court for the payment of decedent's debts, does not inure to the benefit of the other heirs.—AUBUCHON V. AUBUCHON, Mo., 34 S. W. Rep. 569.

2. ADMINISTRATION—Trust Funds.—Where an intestate in his lifetime so commingled trust funds with his own that they cannot be identified in the hands of his administrator, the claims of the beneficiaries were those of ordinary creditors against decedent's estate.—PRIOR V. DAVIS, Ala., 19 South. Rep. 440.

3. ADMINISTRATION—Validity.—Administration upon the estate of one who is alive, and the sale of a land certificate thereunder are void.—SCHLEICHER V. GUTBROD, Tex., 34 S. W. Rep. 657.

4. ADVERSE POSSESSION.—The occasional cutting of firewood on, or the taking of rock from, land, and permitting others to do so, and the payment of taxes thereon, all without the owner's knowledge, and without inclosing the land, will not constitute adverse possession thereof.—HERBST V. MERRIFIELD, Mo., 34 S. W. Rep. 571.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A general exception of exempt property from an assignment for the benefit of creditors does not, *ipso facto*, make the assignment deed void for uncertainty, or fraudulent and void as against creditors, and does not authorize an attachment against the assignee on account of its having been executed.—PARKER V. CLEAVELAND, Fla., 19 South. Rep. 344.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity. —Where an assignment for benefit of creditors is a partial one only, its validity is not impaired by the fact that before its execution the assignors were engaged in fraudulently converting a part of their assets into money to prevent the same from being subjected by their creditors.—THOMPSON V. PRESTON, Miss., 19 South. Rep. 347.

7. ATTACHMENT — Exemptions — Express Wagon.— Under a statute exempting from attachment one "express wagon," held that a vehicle suited and adapted to the transportation of luggage, truck, small parcels of merchandise, light country produce and other light articles, and one that may conveniently be used for such purpose, is within the exemption.—WALKER V. CARKIN, Me., 34 Atl. Rep. 29.

8. BANKS—Usury.—Code 1886, § 4140, making it a misdemeanor for any banker to discount commercial paper at a higher rate than 8 per cent. per annum, does not apply to national banks.—SLAUGHTER V. FIRST NAT. BANK OF MONTGOMERY, Ala., 19 South. Rep. 430.

9. BASTARDY PROCEEDINGS.—In bastardy proceedings, that the bond given by defendant for his appearance before the circuit court was defective does not affect the jurisdiction of the circuit court to try the case.—WALKER V. STATE, Ala., 19 South. Rep. 353.

10. CARRIERS OF PASSENGERS—Negligence—Evidence. —Testimony of a mother that the death of her child was caused by a cold contracted by exposure to cold in defendant's railway coach, was competent as tending to establish the cause of such death, where it was shown that such witness was 46 years old, and the mother of eleven children; that the child in question

was robust and healthy; that its feet and hands became cold, and it became sick, and affected with sneezing and coughing, and contracted a severe cold, in the coach in question; that though it had the best of care, and was subjected to no other exposure, it grew worse, until it died; and that she had attended it constantly during such illness.—FT. WORTH & D. C. RY. CO. v. HYATT, Tex., 34 S. W. Rep. 677.

11. CARRIERS—Regulations—Enforcement.—The regulation of a railroad company that a monthly commutation ticket shall be surrendered by the passenger to the conductor on the last trip taken during the period for which it is issued, is a reasonable regulation of the railroad company in the conduct of its business as a common carrier of passengers; and if this regulation be indorsed on the ticket, and the passenger holding said ticket fails or refuses to surrender it on his last trip, or pay his fare to the conductor according to the legally established rates of the company, he can be ejected from the car.—ROGERS v. ATLANTIC CITY R. CO., N. J., 34 Atl. Rep. 11.

12. CHATTEL MORTGAGE—Validity—Fraudulent Conveyance.—A mortgage given by a purchaser to secure the purchase price of a stock of goods—covering only the goods purchased, and given as a part of the transaction of purchase—is not fraudulent as to creditors of the purchaser, though he is allowed to sell from the mortgaged property in the course of trade; the transaction not having withdrawn from creditors any property which was subject to their claims, and not involving any fraudulent intent on the part of the debtor.—ADKINS v. BYNUM, Ala., 19 South. Rep. 400.

13. CONSTITUTIONAL LAW—Abandonment by Husband.—Code, § 1832, providing that "every woman whose husband shall abandon her shall be deemed a free trader, and she shall have power to convey her personal estate and her real estate without assent of her husband," is not in violation of Const. art. 10, § 6, providing that a married woman may convey her lands with her husband's written consent.—HALL v. WALKER, N. Car., 24 S. E. Rep. 6.

14. CONTEMPT—Verbal Order of Imprisonment.—Persons cannot be legally imprisoned for contempt by the district court simply on an oral order to an officer to confine such persons in jail, and without the issuance of a writ of commitment.—EX PARTE KEARBY, Tex., 34 S. W. Rep. 635.

15. CONTRACT—Bailment.—Under an agreement to pay one dollar per day for the use of oxen, and to feed and care for them till returned, the pecuniary compensation of the bailor is limited to the number of days the oxen are actually used, though they are kept for a longer period.—LEARNED-LETCHER LUMBER CO. v. FOWLER, Ala., 19 South. Rep. 396.

16. CONTRACT—Damages.—The rule that one who has been damaged by a breach of a contract should do all that reasonably lies within his power to protect himself from loss by seeking another contract of like character, the profits of which should be applied in mitigation of such damages, is correct as applied to some classes of cases, and has especial reference to contracts for personal services, or for the use of some special instrumentality, either with or without connection with such personal services.—SULLIVAN v. MCMILLAN, Fla., 19 South. Rep. 340.

17. CONTRACT—Damages.—A refusal to allow one to perform a stipulated service does not entitle him to recover the agreed price for full performance, but only such damages as he actually sustained by the refusal.—WILLIAM TARR CO. v. KIMBROUGH, Ky., 34 S. W. Rep. 928.

18. CONTRACT—Physicians and Surgeons.—A contract by a physician to permanently retire from the practice of medicine in a particular city and vicinity, in consideration of $250, is reasonable and valid.—WEBSTER v. WILLIAMS, Ark., 34 S. W. Rep. 537.

19. CONTRACT TO PAY ANOTHER'S DEBT—Novation.—Where a third person contracts in writing to pay the debt of another, and the creditor, with his consent and relying on the contract, credits the debtor, and charges such person with the debt, he, by novation, becomes directly liable to the creditor.—PUGH v. BARNES, Ala., 19 South. Rep. 370.

20. CONTRACT—Validity.—A contract under which plaintiff agreed to establish and maintain a shooting gallery in a house furnished by defendant, the net profits of which business were to be divided between them, and the business to continue so long as it was profitable or paid expenses, does not, on account of its uncertainty, furnish a cause of action which will support a judgment for damages in case of a breach thereof by defendant, by terminating such business.—PULLIAM v. SCHIMPF, Ala., 19 South. Rep. 428.

21. CONTRACTS—Indefiniteness.—In a suit to enforce a vendor's lien, evidenced by a note which provided that the note is to be traded out by the payee by buying live stock from the maker if the prices can be agreed upon, otherwise it is to be paid in cash when due, that the payee examined some stock, and expressed himself satisfied with the prices, no particular stock, though, being selected by the payee, is no defense.—BUFORD v. WARD, Ala., 19 South. Rep. 358.

22. CONVERSION BY CARRIER—Evidence.—In conversion it appeared that defendant carrier received a horse consigned to "T & W," and transported it to the point of destination; that plaintiff claimed the shipment was to himself, and demanded possession of the horse; that defendant refused to deliver it till it had some evidence of plaintiff's right to receive the horse, and used all reasonable efforts to ascertain who was the proper consignee; that plaintiff never furnished any evidence; and that, when it was finally determined to whom the horse should be delivered, he refused to accept the horse, and pay the charges, whereupon defendant sold it at public auction: Held, that there was no conversion by defendant.—GULF, C. & S. F. RY. CO. v. FOWLER, Tex., 34 S. W. Rep. 661.

23. CONVERSION—Damages.—In trover for the conversion of logs cut from plaintiff's land by an inadvertent trespasser, and purchased by defendants in good faith, the measure of damages is the value of the logs after severance, and before their removal from the land, and not their increased value at the place of delivery.—WHITE v. YAWKEY, Ala., 19 South. Rep. 360.

24. CORPORATION—Quasi Public Corporations—Charter.—The charter of a private corporation, which is in its nature essentially public, is not protected from legislative interference, unless, in unmistakably clear language, the State has indicated a deliberate purpose not to interfere in all time to come, with the rights and privileges granted.—WINCHESTER & L. TURNPIKE ROAD CO. v. CROXTON, Ky., 34 S. W. Rep. 518.

25. CORPORATION—Service of Process.—Service of summons, in an action against a foreign corporation on an officer thereof who was also plaintiff's attorney in fact for the commencement and prosecution of such action, was invalid.—GEORGE v. AMERICAN GINNING CO., S. Car., 24 S. E. Rep. 41.

26. CORPORATIONS—Preferred Stock—Lien.—A corporation cannot, in the absence of statutory authority, make its preferred stock a lien upon its property; nor can an agreement between the subscribers to the stock of the corporation make such stock a lien on its property, as against bondholders or general creditors without notice of such agreement.—CONTINENTAL TRUST CO. OF NEW YORK v. TOLEDO, ST. L. & K. C. R. CO., U. S. C. C. (Ohio), 72 Fed. Rep. 93.

27. CREDITORS' BILL—Parties.—A bill by creditors of a decedent against his heirs, alleging that the decedent in his lifetime, without consideration, conveyed certain land to said heirs, which conveyance rendered the decedent insolvent, and was void as against the demands of complainant, need not make the decedent's administrator a party, or show, further, why he was not made a party.—MERCHANTS' NAT. BANK OF TUSCALOOSA v. MCGEE, Ala., 19 South. Rep. 356.

28. CRIMINAL EVIDENCE—Homicide.—Dying Declarations cannot be objected to on the ground that deceased at the time of making them, had hope of recovery, because immediately on receiving the wound he remarked to a person that he would get even with him; he having a short time afterwards stated that the wound was mortal, and having continued to make this statement till his death.—POLK v. STATE, Tex., 34 S. W. Rep. 633.

29. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—A complete foundation has been laid for the introduction of dying declarations in evidence by making proof that the attending physician had told the deceased that his wounds were dangerous, that the deceased had stated that he was going to die, and at the time of making his statement his extremities were cold, and shortly afterwards he died.—STATE v. SMITH, La., 19 South. Rep. 453.

30. CRIMINAL EVIDENCE—Indecent Assault—Declarations of Prosecutrix.—On trial for indecedent assault, statements made soon afterwards by prosecutrix to her mother are inadmissible unless shown to be so closely connected with the assault in point of time as to be *res gestæ*.—PRICE v. STATE, Tex., 34 S. W. Rep. 622.

31. CRIMINAL EVIDENCE—Photograph.—On a trial for assault with intent to kill, it was not error to permit a photographer, who was present at the time of the assault, to introduce in evidence, to be used as a diagram, a photo representing the window through which the person assaulted was shot, with said person occupying the position he was in at the time of the shooting, the said photograph having been made by said photographer the morning after the shooting.—STATE v. KELLEY, S. Car., 24 S. E. Rep. 60.

32. CRIMINAL EVIDENCE—Robbery.—On a prosecution for robbery at H, it being in evidence that defendant gambled, it was error to admit evidence that H was infested with a gang of gamblers, who were reported to be the persons who had committed robberies there for several years past.—BROWN v. STATE, Ark., 34 S. W. Rep. 541.

33. CRIMINAL LAW—Arson—Burning One's Own House.—In the absence of statute, a person cannot be convicted of arson for burning his own house, of which he has possession, though done with intent to defraud an insurance company.—STATE v. SARVIS, S. Car., 24 S. E. Rep. 53.

34. CRIMINAL LAW—Embezzlement—Evidence.—One intrusted as attorney to collect money, who, concealing from his principal the fact of collection, appropriates to his own use part of the money collected, without any authority, is guilty of embezzlement, though he intended to replace it out of money of his own.—FARMER v. STATE, Tex., 34 S. W. Rep. 620.

35. CRIMINAL LAW—Flight of Accused.—In a prosecution for homicide it is not error to exclude evidence that defendant did not attempt to run away after the homicide, where the State did not attempt to show flight by defendant, and a voluntary surrender had already been shown.—HARVEY v. STATE, Tex., 34 S. W. Rep. 623.

36. CRIMINAL LAW—Instructions—Accomplice.—When the testimony of a witness for the State tends strongly to show that he was an accomplice in the crime for which the defendant is being tried, the instructions should state the law governing the testimony of an accomplice, and leave it to the jury to determine whether or not the witness was one.—BALLEW v. STATE, Tex., 34 S. W. Rep. 616.

37. CRIMINAL LAW—Larceny—Possession.—On a trial for larceny, where there was evidence that defendant was keeping the property at prosecutor's request, it was error to instruct that the possessor of recently stolen property is the thief, unless his possession is satisfactorily explained, without predicating it on a finding that larceny had been committed.—THOMAS v. STATE, Ala., 19 South. Rep. 403.

38. CRIMINAL LAW—Theft — Intent. — On trial for theft of a chicken it was error to exclude testimony that on the night of the alleged theft witness and defendant agreed, for sport merely, and without intent to steal, to catch a chicken in prosecutor's henroost, make it squall, and then let it go.—COLWELL v. STATE, Tex., 34 S. W. Rep. 615.

39. DEDICATION—Street—Married Woman.—It having been provided by statute that a married woman can only convey her separate real estate by the joint deed of herself and her husband, she can dedicate land for use by the public as a street only by such a deed, or by a statutory dedication; and a dedication cannot be established against her by equitable estoppel.—VANSANDT v. WIER, Ala., 19 South. Rep. 424.

40. DEED—Delivery.—Evidence that a vendor, by direction of the vendee, who was indebted in another State, conveyed the land by deed absolute in form to the vendee's wife, and delivered it to a person designated by the vendee, is *prima facie* evidence of delivery to the wife, though the deed was afterwards found in possession of the husband, and he claimed the land.—RUMSEY v. OTIS, Mo., 34 S. W. Rep. 551.

41. DEED OF TRUST.—A deed of trust purporting to have been executed by a husband and wife in which the name of the wife who was owner of the property, does not appear in the body of the instrument is invalid.—DAVIDSON v. ALABAMA IRON & STEEL CO., Ala., 19 South. Rep. 390.

42. DEED OF TRUST—Description.—A deed of trust on the lands and railway of a mining and railway corporation provided that the mortgage should cover all the "personal property of every kind, now owned, or hereafter to be acquired and owned and used, whether by purchase or otherwise, in connection with, and for use in developing and operating, its said coal mines and other works of improvements now on, or hereafter to be opened upon, said lands or any part thereof." The deed authorized the grantor to enjoy the real and personal property conveyed until default, and to take and use the rents and income therefrom: Held, that the mortgage did not cover the profits or proceeds of the business of mining, such as coal, coke, and iron mined and manufactured, and accounts from the sale thereof.—ALABAMA NAT. BANK v. MARY LEE COAL & RAILWAY CO., Ala., 19 South. Rep. 404.

43. DEED TO HOMESTEAD—Mistake in Description—Reformation. — A deed to the homestead, which is properly signed and acknowledged by both husband and wife, but which, by mistake, misdescribes the land by giving a wrong section number, may be reformed in equity.—TILLIS v. SMITH, Ala., 19 South. Rep. 374.

44. DEED — Warranty—After-acquired Title.—Where land subject to a duly recorded mortgage was conveyed by the mortgagor, with warranty, and a third person subsequently purchased at the foreclosure sale for the mortgagor, the title he acquired inured to the benefit of the grantee in the warranty deed, as against a purchaser from such third person with notice that he held the land for the mortgagor.—MORRIS v. HOUSLEY, Tex., 34 S. W. Rep. 659.

45. DESCENT—Partition.—Under Rev. St. 1889, § 4449, providing that when several lineal descendants are all of equal degree of consanguinity to the intestate of his father, mother, brothers, etc., or any ancestor living, and their children come into partition, they shall take *per capita*, and where a part of them are dead and a part living, and the issue of those dead have a right to partition, such issue shall take *per stirpes* if nephews and nieces of an intestate come into partition together with the children of deceased nephews and nieces of the intestate, the first shall take *per capita*, and the latter *per stirpes*.—AULL v. DAY, Mo., 34 S. W. Rep, 578.

46. ELECTION OF REMEDIES — Estoppel.—The seller, after recovery of judgment for the purchase price of the property, and levy of attachment thereon, cannot, on a claim being interposed in such action, by the

buyer, that the property is exempt, sue in *detinue* for its recovery, on the ground that the title to the property was not to pass until the purchase price was paid. —FULLER V. EAMES, Ala., 19 South. Rep. 366.

47. EQUITY — Jurisdiction.—A suit in equity, to remove a cloud upon complainant's title to land and exclude defendant from such land, cannot be maintained, in a federal court, when the defendant is in possession of the land and the complainant is not, the remedy at law being adequate and complete; and a local statute, permitting the bringing of such suits in the State courts, does not enlarge the power of the federal courts to entertain the same.—GORDAN V. JACKSON, U. S. C. C. (Ark.), 72 Fed. Rep. 86.

48. ESTOPPEL — Sale of Land.—Where, in the division of a decedent's estate, a note due the estate is given one of the distributees as her share of the estate, that she subsequently takes from the maker a mortgage on land as security for the note, and purchases on foreclosure of the mortgage, does not estop another distributee to claim an interest in the land adverse to the mortgagee.—COOPER V. LINDSAY, Ala., 19 South. Rep. 379.

49. EVIDENCE — Proof of Handwriting.—An unrecorded instrument, purporting to be a deed, signed by one person as maker, and attested by two other persons as witnesses, is admissible in evidence, upon proof showing that all three of these persons are dead, and that the signatures of the two latter upon the instrument are in their genuine handwriting.—MCVICKER V. CONKLE, Ga., 24 S. E. Rep. 23.

50. EXECUTION SALE — Purchase by Judgment Creditor.—A creditor who buys in land at execution sale under his judgment, by merely crediting the amount of his bid on such judgment, is not a *bona fide* purchaser.—AULTMAN, MILLER & CO. V. GEORGE, Tex., 34 S. W. Rep. 652.

51. FALSE IMPRISONMENT — Arrest —Code Cr. Proc. art. 229, authorizing an officer to arrest an accused without a warrant, where it is shown, on satisfactory proof, that a felony has been committed, and the accused is about to escape, a sheriff arresting a person without a warrant at the request of a third person, on mere suspicion that he is guilty of a felony, without any proof thereof, is liable for false imprisonment.—KARNER V. STUMP, Tex., 34 S. W. Rep. 656.

52. FEDERAL COURTS — Following State Practice.—Rev. St. § 914, providing that the practice, pleading, etc., in the circuit and district courts in civil causes shall conform as nearly as may be to the practice, pleading, etc., in the State courts, does not authorize the federal courts to disregard the established distinctions between law and equity nor to permit equitable defense in actions at law, although the State statutes permit such defenses to be made in the State courts.—DAVIS V. DAVIS, U. S. C. C. of App., 72 Fed. Rep. 81.

52. FEDERAL COURTS—Mortgage Foreclosure.—A deed absolute in form, given as security for a loan of money, and executed contemporaneously with the debtor's notes and with a bond to reconvey, given by the grantee, all in accordance with the provisions of the Georgia Code (sections 1969-1971), may be foreclosed as a mortgage, by a suit in equity in a federal court, notwithstanding that the above Code provisions give a special remedy at law; for the equity jurisdiction of the federal courts cannot be limited by State legislation.—RAY V. TATUM, U. S. C. C. of App., 72 Fed. Rep. 112.

54. FEDERAL OFFENSE — Conspiracy under Federal Statutes.—The statutes of the United States do not define what a conspiracy is, or create any new offense. They merely recognize the crime of conspiracy as known to the common law, and the courts must go to the common law to determine what it is. The statutes, however, impose one limitation upon the common law crime, namely, that there must be some overtact. —UNITED STATES V. MCCORD, U. S. D. C. (Wis.), 72 Fed. Rep. 159.

55. FEDERAL OFFENSE—Improper Use of Mails — Obscene Matter.—Rev. St. § 3893, making it a criminal offense to place in the mails any "obscene, lewd, or lascivious publication," refers only to publications which are immoral by reason of their relation to sexual impurity, the words having the same meaning as is given them at common law in prosecutions for obscene libel.—SWEARINGEN V. UNITED STATES, U. S. S. C., 16 S. C. Rep. 562.

56. FRAUDULENT CONVEYANCE — Present Debtor.—A voluntary conveyance is not *per se* void, except as against present debts.—SEVERS V. DODSON, N. J., 34 Atl. Rep. 7.

57. FRAUDULENT CONVEYANCES — Preferring Creditors.—The fact that a creditor accepts a mortgage from a failing or insolvent debtor, knowing that the debtor's purpose is to hinder and delay other creditors, and that such will be the result, does not invalidate the instrument, if it be taken in good faith to secure a valid debt.—WOOD V. CASTLEBURY, Tex., 34 S. W. Rep. 653.

58. HOMESTEAD.—During coverture, and while the husband and wife are living together, there can be no such thing as a separate homestead of the wife, distinct from that of the husband.—ROSENBERG V. JETT, U. S. C. C. (Ark.), 72 Fed. Rep. 90.

59. HOMESTEAD—Dower Lands.—Under laws effectuating Const. 1868, art. 2, § 32, which directed an enactment to exempt from process to the head of any family residing in this State a homestead in lands, whether held in fee or any lesser estate, a widow cannot claim a homestead exemption in her dower lands in addition to a homestead exemption previously claimed and allowed in her deceased husband's estate.—LANHAM V. GLOVER, S. Car., 24 S. E. Rep. 49.

60. HUSBAND AND WIFE — Mortgage—Death.—Where a husband and wife mortgage her separate property, their minor children are not proper parties to an action by the wife, after his death, against the mortgagee, for possession, in which the mortgagee asks foreclosure of his mortgage.—KELLER V. BEATTIE, Tex., 34 S. W. Rep. 667.

61. HUSBAND AND WIFE—Contracts between—Equity. —A husband purchased land for his wife, under an agreement with her that a mortgage should be given by her to a third person to secure the husband in the repayment of the bond given by him for the price, and thereby avoid the common law rule prohibiting contracts between the husband and wife. The husband and wife were subsequently divorced: Held, that equity would give effect to the transaction, so as to enforce the equitable lien of the husband on the land for repayment of the purchase price paid by him.—ECKERMEYER V. HOFFMEIER, Ky., 34 S. W. Rep. 521.

62. INSURANCE — Action on Policy Pleading.—As a policy, as a written instrument, imports a consideration in an action thereon, in the absence of a plea of want or failure of consideration, evidence of non-payment of premiums is inadmissible.—PHŒNIX INS. CO. V. HAGUE, Tex., 34 S. W. Rep. 654.

63. INSURANCE—Total Loss.—The total loss of a building under Rev. St. art. 2971, does not mean the entire destruction of its materials, but that the building has lost its specific character and identity as a house; and, in an action to recover from an insurance company for a total loss, evidence that, by the use of the materials remaining, the building could be reconstructed for less than the amount of the policy, to authorize the company to rebuild, is inadmissible.—ROYAL INS. CO. V. MCINTYRE, Tex., 34 S. W. Rep. 664.

64. INSURANCE—Warranties—Waiver.—A covenant in a fire policy by which the insured agrees to keep a set of books showing all business transactions and the last inventory of the business locked in a fireproof safe at night and when the store is not open for business, and that the policy shall be void if, in case of loss, they are not produced, constitutes a warranty which must be strictly, and not substantially complied

with.—NORTHWESTERN NAT. INS. CO. v. MIZE, Tex., 34 S. W. Rep. 670.

65. JOINT WRONGDOERS—Action Over for Indemnity.—In an action against the District of Columbia for injuries caused by the want of a cover on a gas box placed by a gas company in the sidewalk, there was no evidence of actual notice to the District of the absence of a cover, though there was evidence that the box had been uncovered for some time: Held, that a verdict against the District determined that the defect had existed so long as to impute negligence to those whose duty it was to keep the box in repair, and hence a judgment on such verdict established negligence on the part of the company, which was conclusive in a subsequent suit over against it by the District.—WASHINGTON GASLIGHT CO. v. DISTRICT OF COLUMBIA, U. S. S. C., 16 S. C. Rep. 564.

66. JUDGMENT OF SISTER STATE—Impeachment.—The only grounds upon which the judgment of a court of general jurisdiction can be disregarded in another State are—First, where the adjudging tribunal had no jurisdiction over the person against whom judgment was pronounced, or over the subject-matter of the litigation; and, second, where the adjudication of the foreign tribunal has been obtained by fraud.—FAIRCHILD v. FAIRCHILD, N. J., 34 Atl. Rep. 10.

67. JUDGMENT—Res Judicata.—A judgment in an action for damages for the construction by a railroad company of a permanent drain, whereby water is thrown across the land of another, is a bar to an action for damages subsequently accruing (no material change being made in the drain) by the washing away of the soil.—INTERNATIONAL & G. N. RY. CO. v. GIESELMAN, Tex., 34 S. W. Rep. 658.

68. JUDGMENT—Vacation.—The court cannot, after the term at which a default judgment was rendered in an action where service was by attachment of property, vacate the judgment on a showing that the property attached was not the property of the defendant.—SOULARD v. VACUUM OIL CO., Ala., 19 South. Rep. 414.

69. JUDICIAL SALE—Money in Hands of Officer.—A purchaser at a judicial sale, who allows a cash payment made by him on the property to remain in the hands of the officer selling after the sale has been set aside, does so at his own risk, and he is not entitled to be credited with the amount on a subsequent purchase of the property when resold by another officer.—HEAD v. MOORE, Tenn., 34 S. W. Rep. 518.

70. LIMITATIONS—Libel—Statements in Judicial Proceedings.—A cause of action for libel, founded upon publications made in the course of judicial proceedings, does not accrue until the final determination, in favor of the party libeled, of the proceedings in which the publication is made, and the statute of limitations accordingly does not begin until then to run against such cause of action.—MASTERSON v. BROWN, U. S. C. C. of App., 72 Fed. Rep. 136.

71. LIFE INSURANCE—Notice of Forfeiture.—In an action on a life policy on the joint lives of plaintiff and his wife, containing a provision that no forfeiture should be declared for non-payment of premium, unless a notice in writing should have been mailed by defendant to plaintiff, it was error to admit, over objection, evidence of such notice and forfeiture, where they had not been affirmatively alleged by defendant, though plaintiff had alleged, and defendant, by both general and special denials, denied that the policy was in force at the date of the death of plaintiff's wife, and that plaintiff and his wife had complied with the terms of the policy as to the payment of premiums.—MULLEN v. MUTUAL LIFE INS. CO., Tex., 34 S. W. Rep. 605.

72. MARRIED WOMEN—Mortgage of Separate Estate.—Under the Act of 1887, providing that a mortgage by a married woman of her separate estate shall be a charge thereon whenever an intention to that effect is declared in the mortgage, no such intention need appear in the instrument, if it was in fact executed for the benefit of her separate estate.—RIGBY v. LOGAN, S. Car., 24 S. E. Rep. 56.

73. MASTER AND SERVANT—Injuries—Defective Machinery.—In an action by a servant for personal injuries caused by defective machinery, a complaint alleging that the defect had existed for a long time, and that the master had negligently failed to remedy the same, and negligently permitted the machinery to be operated in the defective condition, sufficiently alleges negligence on the part of the master.—CONRAD v. GRAY, Ala., 19 South. Rep. 398.

74. MASTER AND SERVANT—Injury—Contributory Negligence.—A railroad brakeman who, in his contract of employment, stated that he had had three years' experience in that capacity, and knew it was dangerous to climb up the side of a box car by the ladder while the train was moving, was killed while attempting, without any urgent necessity therefor, to climb up a ladder whose grab iron he knew was defective, and which it was part of his special duty to examine: Held, that he was guilty of contributory negligence, and there could be no recovery.—CLYDE v. RICHMOND & D. R. CO., U. S. C. C. of App., 72 Fed. Rep. 123.

75. MASTER AND SERVANT—Vice-principal.—Negligence.—A railroad engineer, with authority to direct a brakeman to put on the brake, is, as to such brakeman, a vice-principal, within Act March 10, 1891, providing that "all persons engaged in the service of any railway corporation who are intrusted by such corporation with the authority to direct any other employee are vice-principals of such corporation, and not fellow-servants with such employee."—TEXAS CENT. RY. CO. v. FRAZIER, Tex., 34 S. W. Rep. 664.

76. MECHANIC'S LIEN—Failure to Register Contract.—Failure of a contractor to register the contract as required by statute to fix his mechanic's lien will not defeat the lien, where the owner had the original contract (of which no copy existed) in his possession, and refused on demand to surrender it for registry.—PARKS v. TIPPIE, Tex., 34 S. W. Rep. 676.

77. MECHANIC'S LIEN—Homestead.—A claim of homestead cannot be asserted against a mechanic's or material-man's lien.—MCANALLY v. HAWKINS LUMBER CO., Ala., 19 South. Rep. 417.

78. MORTGAGE—Defective Title—Mistake of Law.—In an action to foreclose a mortgage securing the price of land other than that mortgaged, defendants may be granted relief on the ground that the vendor, though her deed recited that she owned, and it professed to convey a fee-simple title, and both parties acted under the erroneous legal conclusion that she had such title, had in fact only a life estate in the property.—WILSON v. OTT, Penn., 34 Atl. Rep. 23.

79. MORTGAGE OF CORPORATION PROPERTY—Lien.—Under Code, § 1255 (Acts 1879), disabling corporations from conveying their property, by mortgage, freed from liability on a judgment obtained against such corporations "for labor performed, for material furnished, or torts committed by such corporations, their agents or employees," liens for labor performed or material furnished after making the mortgage are superior thereto.—POCAHONTAS COAL CO. v. HENDERSON ELECTRIC LIGHT & POWER CO., N. Car., 24 S. E. Rep. 22.

80. MUNICIPAL CORPORATIONS—Liquor License—Ordinance.—A conviction for the violation of an ordinance against the sale of intoxicating liquor by a retail liquor dealer on Sunday, which operates as a revocation of the license of the liquor dealer, is void, and the ordinance which confers upon the conviction such an operation is also void, as not being within the chartered powers of the common council to enact.—STATE v. MAYOR OF CITY OF RAHWAY, N. J., 34 Atl. Rep. 5.

81. MUNICIPAL CORPORATIONS — Privilege Tax on Trades.—An ordinance imposing a license tax on all dealing in second-hand clothing does not violate Const. art. 5, § 3, requiring such taxes to be uniform between those belonging to the same class.—ROSENBAUM v. CITY OF NEWBERN, N. Car., 24 S. E. Rep. 1.

82. NEGLIGENCE—Defective Manhole.—Where plaintiff was injured by the tilting of the cover of a manhole

maintained by defendant in the sidewalk in front of his premises, the fact that an independent contractor, who delivered coal to defendant, negligently failed to replace the cover properly, will not relieve defendant from liability, if the negligent construction of the cover directly contributed to plaintiff's injury.—BENJAMIN v. METROPOLITAN ST. RY. CO., Mo., 34 S. W. Rep. 590.

83. NEGLIGENCE—Examiner of Title.—A right of action for negligence in the examination of a title accrues at the time the examination is made and reported, and not when damages result therefrom.—SCHADE v. GEHNER, Mo., 34 S. W. Rep. 576.

84. NEGLIGENCE—Gas Companies.—A gas company is bound to use reasonable care in the inspection of its pipes, and in repairing leaks therein, after notice, whether caused by its own negligence or not.—PINE BLUFF WATER & LIGHT CO. v. SCHNEIDER, Ark., 34 S. W. Rep. 547.

85. NEGLIGENCE OF SERVANT—Injuries to Third Persons—Evidence.—In an action for injuries from being run into by a horse and buggy negligently driven by defendant's servant, a refusal to allow the servant to testify whether he willfully ran into plaintiff was proper, where the only allegation in the petition on that issue was an argumentative one that the injuries could not have been inflicted save through "the gross mismanagement and carelessness, amounting to criminal neglect," of the servant; especially where plaintiff, in open court, disclaimed that the petition claimed that the servant acted willfully.—TAYLOR v. SCHERPE & KOKEN ARCHITECTURAL IRON CO., Mo., 34 S. W. Rep. 581.

86. NEGOTIABLE INSTRUMENT—Extension of Note.—The payment and acceptance of interest on a past due note for a specified period beyond the date of its maturity, and the indorsement thereof on the note by the payee, are only *prima facie* evidence of a contract to extend payment, and will not discharge the surety, if it appears that no such extension was in fact agreed to by the payee.—MADDOX v. LEWIS, Tex., 34 S. W. Rep. 647.

87. NEGOTIABLE INSTRUMENT—Liability of Indorser.—Where defendant, payee of a note, indorses it for a certain amount, he cannot be held liable for attorney's fees, provided for in the note, in addition to the amount indorsed.—COLE v. TUCK, Ala., 19 South. Rep. 377.

88. NEGOTIABLE INSTRUMENT—Note—Alteration.—To add a name to a note as a joint maker thereof, without the knowledge and consent of the original maker of the note, after it has been transferred, is a material alteration thereof, and discharges the original maker from liability thereon.—FORD v. FIRST NAT. BANK OF CAMERON, Tex., 34 S. W. Rep. 684.

89. NEGOTIABLE INSTRUMENT—Sealed Note.—Though a note under seal is executed in blank as to the payee's name, if the maker, after such name is inserted, acknowledges the note as his, he will be liable thereon.—WESTER v. BAILEY, N. Car., 24 S. E. Rep. 9.

90. PARTITION.—The right of a tenant in common to partition is a matter of right, and is unaffected by the fact that a sale, the land being incapable of equitable partition otherwise, would not be to the best interest of all the owners.—CATES v. JOHNSON, Ala., 19 South. Rep. 416.

91. PAYMENT — Notice of Assignment.—The maker of a bond payable to F is charged with notice that it had become the property of N, where, on making a payment, he is given a receipt signed "F," per an agent, reciting receipt of the money "for N."—NATIONAL FERTILIZER CO. v. THOMASON, Ala., 19 South. Rep. 415.

92. PRINCIPAL AND AGENT — Purchase of Lands.—One purchasing lands through an agent is affected by the previously acquired knowledge of the agent in respect to matters affecting the title, if the agent had that knowledge in his mind when he made the purchase. Where it is sought, therefore, to bind the principal by his agent's knowledge, it is competent to adduce evidence tending to show previous knowledge by the agent, but the party is bound to follow this up by evidence tending to show that the agent had it in mind at the time.—BROWN v. CRANBERRY IRON & COAL CO., U. S. C. C. of App., 72 Fed. Rep. 76.

93. PRINCIPAL AND AGENT — Unauthorized Act of Agent.—In an action on a note, where defendant pleaded that, while the note was in the hands of plaintiff's agent, he turned over to the agent a smaller note of a third person, which was accepted by the agent as part payment of the one in suit, and it was shown that plaintiff had the smaller note, which was at the time of trial in the hands of her attorney for collection, it was error to exclude evidence thereof on proof alone that the agent had no authority to accept the note as payment; the action of plaintiff in retaining the note after the filing of the answer tending to show a ratification of its acceptance by the agent, if received by him as alleged.—CAMPBELL v. JENKINS, Tex., 34 S. W. Rep. 673.

94. PROCESS — Summons — Service on Corporation.—Under Sand. & H. Dig. § 5669, providing that service of summons on a domestic corporation may be on one of the chief officers, and, in case of their absence, on one of the other officers or an agent, the return on a summons showing service on an agent of the corporation does not show good service on the corporation, it not being stated therein that none of its chief officers were to be found in the county.—ARKANSAS COAL, GAS, FIRE-CLAY & MANUFACTURING CO. v. HALEY, Ark., 34 S. W. Rep. 545.

95. RAILROAD COMPANIES — Accident on Track—Negligence.—In an action for personal injuries it appeared that defendant's train was standing on a switch track, and blocked a public crossing; that plaintiff went to the head of the train, crossed over, and was walking back between the main and switch track to the crossing; that he did not look back to see whether a train was approaching on the main track, and that, as he stepped upon it, he was struck by a train; that the track was clear, and that the train might have been seen by plaintiff had he looked back: Held, that plaintiff was chargeable with negligence.—MARTIN v. LITTLE ROCK & FT. S. RY. CO., Ark., 34 S. W. Rep. 545.

96. RAILROAD COMPANY—Street-railway Companies—Negligence.—Recovery for injury to one who tries, by hurrying, to cross a street-car track ahead of an approaching car, and is struck by it before he can get across, is barred by reason of his contributory negligence, though the motorman may be negligent in not stopping the car after he is seen.—WATSON v. MOUND ST. RY. CO., Mo., 34 S. W. Rep. 573.

97. REPLEVIN — Undivided Interest in Crops.—Replevin will not lie by a mortgagee to recover, from a cotenant of the mortgagor in possession of a crop raised on shares, the undivided interest of the mortgagor therein, subject to the mortgage.—MOSELY v. CHEATHAM, Ark., 34 S. W. Rep. 543.

98. SALE — Breach of Warranty.—Where an executed contract of sale of corporate stock contained a warranty on the part of the seller, and also a clause in the nature of a defeasance, of the benefit of which the buyer might avail himself at his option, his waiver of such privilege did not deprive the buyer of his right to recover on such warranty.—BLACKNALL v. ROWLAND, N. Car., 24 S. E. Rep. 1.

99. SALE—Right to Rescind — Waiver.—Where goods were sold under an agreement that one-half of the price was to be paid on delivery and the balance at four months, the vendors, by accepting the first installment two months after delivery, waived their right to reclaim the goods, and the title thereto thereupon vested in the vendee.—CRAWFORD v. SPRAGGINS, Ala., 19 South. Rep. 372.

100. SALES—Bona Fide Purchaser.—A *bona fide* purchaser of attached property from the attachment plaintiff, who secured possession thereof after the at-

tachment, under an agreement with other attaching creditors of the owner, cannot hold the same as against the officer levying the attachment.—JETTON v. TOBEY, Ark., 34 S. W. Rep. 531.

101. STATUTE — Time of Taking Effect.—Const. 1876, art. 3, § 39, provides that no law shall take effect or go into force "until 90 days after the adjournment" of the session at which it was enacted, etc. Held, that the words "until 90 days after the adjournment" mean until a period of 90 days shall have elapsed after the adjournment.—HALBERT v. SAN SABA SPRINGS LAND & LIVE-STOCK ASS'N, Tex., 34 S. W. Rep. 639.

102. TAX TITLES.—A tax title is good though Laws 1895, ch. 119, § 51, declaring that no land shall be sold for taxes unless the taxpayer has not sufficient personal property to pay the same, situated in the county where the tax is due, was not complied with.—STANLY v. BAIRD, N. Car., 24 S. E. Rep. 12.

103. TELEGRAPH COMPANIES—Failure to Deliver Telegram.—A telegraph company through whose failure to deliver a message plaintiff was prevented from visiting his dying stepfather, between whom and himself the relations were tender and affectionate, is not responsible in damages for the injury occasioned by such failure, unless shown to have had notice of the tender and affectionate relations existing between such parties.—WESTERN UNION TEL. CO. v. GARRETT, Tex., 34 S. W. Rep. 649.

104. TRUST FOR MARRIED WOMAN—Power of Disposition.—The words "for the separate and sole use," or equivalent language, qualifying the estate of a trustee for a married woman, must be construed as manifesting the intent on the part of the grantor to limit her right of alienation to the mode and manner expressly provided in the instrument by which the estate is created.—KIRBY v. BOYETTE, N. Car., 24 S. E. Rep. 18.

105. UNLAWFUL DETAINER—Defenses.—A tenant cannot defend an action by his landlord, before a justice of the peace, for unlawful detainer, by setting up the foreclosure of a mortgage executed by the landlord prior to the date of the lease, and an attornment by the tenant to the purchaser at the sale; since Code, § 3389, forbids the merits of the title to be inquired into in such suits.—DAVIS v. POU, Ala., 19 South. Rep. 363.

106. USURY—Note Bearing Illegal Interest.—A provision in a note for the purchase of property, that after maturity it shall bear interest at 10 per cent., renders it usurious, such interest being for the forbearance of the debt after its maturity, and no action can be maintained thereon.—BANG v. PHELPS & BIGELOW WINDMILL CO., Tenn., 34 S. W. Rep. 516.

107. USURY — Note — Verbal Agreement. — A verbal agreement, entered into at the time a note was executed, that a usurious rate of interest shall be paid thereon, renders the note usurious.—ROE v. KISER, Ark., 34 S. W. Rep. 534.

108. VENDOR AND PURCHASER—Interpretation of Contract.—Where one purchases land at an agreed price, and assumes the payment of $4,000 subscribed by the grantor in aid of the extension of a railroad, but because of the abandonment of such extension before completion he is rendered liable only for a part of the subscription, he is not liable for the balance to the grantor.—MILLER v. BARLER, Tex., 34 S. W. Rep. 601.

109. VENDOR AND PURCHASER—Specific Performance.—Where a vendor asks the specific performance of an executory contract to buy land, and an issue is made as to title, the burden rests upon him to show that the title offered is a marketable one, and he cannot recover without such proof, unless the only defects are incumbrances that can be satisfied from the purchase money due, in which case the decree may protect the interests of the purchaser by such requirement.—UPTON v. MAURICE, Tex., 34 S. W. Rep. 642.

110. VENDOR AND VENDEE—Subrogation to Vendor's Lien.—Where it was agreed between a vendor, the vendee, and intervener that the debt for the price should be satisfied by a cash payment, a reconveyance of one-third of the land, and a further payment within a fixed time of a stated sum by the vendee, and that intervener should advance the cash payment for the vendee, and have a lien therefor on the remaining two-thirds, intervener, after the cash payment had been made, and a deed to one-third and payment of the additional sum had been tendered by the vendee within the time fixed, was subrogated to the lien of the vendor on the remainder.—JOHNSON v. PORTWOOD, Tex., 34 S. W. Rep. 596.

111. VENDOR AND VENDEE — Land Certificate—Presumption of Delivery.—Whether the presumption of delivery of a transfer of a land certificate, arising from the fact that the transfer is an ancient instrument, and was witnessed by two witnesses, is overcome by the fact that after its date the certificate on which it was indorsed was in the possession of another than the transferee, who claimed ownership, located and sold the land, his vendee taking possession and paying taxes thereon, is for the jury.—HUFF v. CRAWFORD, Tex., 34 S. W. Rep. 607.

112. WILL—Exercise of Power.—A devise to the testator's wife of all his property, to be disposed of by her among his children as she may think best, vested a life estate in her, with power to divide the land between his children as she thought best.—DEGMAN v. DEGMAN, Ky., 34 S. W. Rep. 523.

113. WILL—Holographic Will — Requisites.—Under a statute requiring, in regard to a holographic will, that it shall be found among the valuable papers or effects of testator, or shall have been lodged in the hands of any person for safe-keeping, a letter from a decedent stating his desire, in case of his death, that certain land shall go to the person to whom the letter is addressed, who was authorized to collect debts due testator and retain the money until testator's return, may be valid as a holographic will, though the addressee was not directed in the letter to preserve it as the testator's will.—ALSTON v. DAVIS, N. Car., 24 S. E. Rep. 15.

114. WILL—"Living Children."—Where a testator devised a life estate to his son, with remainder to the son's "living children," without specifically restricting it to children living at the date of the will or of the testator's death, all the children living when the son died, took equally.—INGE v. JONES, Ala., 19 South. Rep. 435.

110. WILLS — Ambiguous Provisions.—Testator devised to his son the residue of his estate, "and to his care the protection and support of my daughter C during her natural life." Such residue was the larger part of testator's estate, and his will showed that it was not his intention to disinherit any one of his children. Such daughter was frail both in body and mind, and unfit to manage property: Held, that the support of such daughter was made a charge on such residue, and that it was not testator's intention simply to enjoin on such son a moral obligation to support the daughter.—BANK OF FLORENCE v. GREGG, S. Car., 24 S. E. Rep. 64.

116. WILLS—Devise to Wife.—Under the devise, "I give to my beloved wife all my property of every description, to keep and hold together, for her use and the use of my children, after my just debts are paid," the devisee holds the estate as trustee for her own use and the use of the children, without power to sell or convey any estate.—CRUDUP v. HOLDING, N. Car., 24 S. E. Rep. 7.

117. WRONGFUL GARNISHMENT—Evidence.—In an action for wrongfully suing out a writ of garnishment it was improper to permit defendant to testify that at the time the garnishment action was commenced he believed that process of garnishment was necessary to obtain satisfaction of his debt, that he was not influenced either by malice or vexatious spirit in having the garnishment issued, and that he could not see how he damaged plaintiff to the extent claimed or to any extent.—MOBILE FURNITURE COMMISSION CO v. LITTLE, Ala., 19 South. Rep. 443.